FILED
MAR 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 44

CLEMENTE MARTINEZ PEREZ, *Petitioner*

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, *Respondent*

BRIEF OF AMICUS CURIAE

(Francisco Mendoza-Martinez)

JOHN W. WILLIS
1735 DeSales St., N. W.
Washington, D. C.

VINCENT P. DIGIORGIO
THOMAS R. DAVIS
1021 Chester Ave.,
Bakersfield, California

Counsel for Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 572

CLEMENTE MARTINEZ PEREZ, *Petitioner*

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, *Respondent*

BRIEF OF AMICUS CURIAE

(Francisco Mendoza-Martinez)

INTEREST OF THIS AMICUS CURIAE

This amicus curiae is presently before this Court by virtue of a pending petition for certiorari in FRANCISCO MENDOZA-MARTINEZ, *Petitioner* v. ARGYLE F. MACKEY, *Commissioner of Immigration and Naturalization* and HERBERT BROWNELL, JR., *Attorney General of the United States, Respondents*, No. 623. Like the present petitioner, he raises as his sole issue the constitutionality of Section 401(j) of the Nationality Act

of 1940, a 1944 amendment. The factual situations, moreover, are substantially identical. It therefore seems clear that all of the rights of this amicus curiae will be determined in this proceeding rather than in his own.

SUMMARY OF ARGUMENT

The sole issue raised is whether Section 401(j) of the Nationality Act of 1940, a 1944 Amendment, is unconstitutional.

Viewed merely as a Congressional designation of a means of accomplishing voluntary expatriation, the statute must fall because it is an improper conclusive presumption. A legislature may make one fact conclusive evidence of another fact in controversy only if the first is the exact equivalent of the second. Draft evasion by means of departing the United States and voluntary relinquishment of nationality are not such equivalents.

If the statute is defended as a disciplinary measure which Congress was empowered to enact by virtue of the national sovereignty, it must fall for reasons just as compelling. The doctrine of sovereign powers is not only limited to external affairs; it is also limited to areas where the Constitution is silent. Section 401(j) is a punitive measure to facilitate enforcement of compulsory military service, which is obviously within the scope of the express power "to raise . . . armies." Moreover, there is no precedent for using compulsory expatriation as a *punishment* to implement sovereign power, as opposed merely to facilitating the separation of citizens from non-citizens.

Nor does Congress have any implied power to provide for compulsory expatriation arising from the

express constitutional grants to it. The only colorable argument which can be made in this regard is that Congress is empowered by the "necessary and proper" clause, as it is in the case of penal statutes generally. But the deprivation of a fundamental right, like freedom of speech or worship—or even a procedural right such as trial by jury, cannot be employed as a penal sanction, except as the restriction is an inherent result of imprisonment. Only certain of the *privileges* of citizenship, such as the right to vote or hold public office may be independently taken from the individual as criminal punishment. Citizenship, as the very keystone of all our fundamental rights, is therefore protected even against the broad license of the "necessary and proper" clause.

Moreover, even if it were found *generally* that Congress may provide for compulsory loss of citizenship, Section 401(j) provides for the imposition of criminal punishment without any of the protections guaranteed in criminal proceedings. The trier of fact is a Federal administrative agency. The rights of indictment by grand jury, trial by jury, privilege against self incrimination, as well as an obvious number of others are wholly lacking.

And beyond being penal in the modern sense, the challenged statute provides in reality for the primitive, outmoded punishment of banishment or ostracism. It therefore constitutes cruel and unusual punishment.

ARGUMENT

I. PREAMBLE

The petitioner in No. 623 (amicus curiae in this case) was born in the United States. He claims, therefore, to be an American citizen.

A federal administrative agency has decreed that he has forfeited his citizenship and that he is now an undesirable alien. It has ordered that he be permanently deported from the United States. This appeal challenges the constitutionality of the statute relied on by the agency.

It is not unreasonable to speculate that the determination of the instant question may be of considerable significance. There is ground for the conjecture that this Court may be moved to probe very deeply into the theory which underlies representative government. To ask whether Congress may abridge the right of citizenship is perhaps to ask what citizenship, within the democratic concept, really is.

In due course we shall deal as we are able with the formidable considerations present here, but at this point we have a more limited concern: *Whatever may be the final determination of the questions raised, it is respectfully urged that this Court has bound itself to approach them with the presumption that the challenged section is unconstitutional.*

Where fundamental liberties are sought to be abridged by legislative action, this Court has most vigorously insisted that the ordinary presumption of constitutionality must be reversed. (*Thornhill* v. *Alabama*, 310 U. S. 88, *Thomas* v. *Collins*, 323 U. S. 516.)

And basic as are those specially guarded liberties, they are rooted, in turn, in the right of citizenship itself. Such guarantees as freedom of speech and freedom of worship presuppose an equally protected right to remain on this soil in order to exercise them.

To hold otherwise would be to render vulnerable

to an attack by indirection the very privileges which have thus far been successfully defended against every direct assault:

> "One can hardly be said to be entitled to anything at the hands of a government if that government has the power to cast a person out . . . If the Congress can take away citizenship, all the rights which the citizen so firmly believes to be unalienable may vanish over the horizon, out of sight and reach of the ship which bears him into exile or returns him to some land from whose horrors and tortures he or his ancestors fled to our shores. For to take away a person's citizenship is to make him an alien, subject to deportation." ("Can Congress Take Away Citizenship?" Harold E. Hurst, 29 R. M. L. R. 62, 64).

It is not the present petitioner who should grasp the heavy oar here. Rather this Court should require that the Government establish, in the plainest kind of terms, that the challenged statute should be sustained.

II. INTRODUCTION

Proponents of the constitutionality of the statute challenged here, and its companion subsections, have relied in the past on two distinct and independent lines of argument:

> 1. It is true that Congress is vested only with the power to confer citizenship, not the power to take it away. Expatriation can only be accomplished by voluntary choice. But it is essential to the functioning of government that the status of persons within its borders be definitely ascertainable. Moreover, there is some doubt as to whether the right of expatriation may be exercised without the formal consent of the sovereign. Congress, therefore, may properly

designate those acts by which the citizen may make known his decision to relinquish his nationality and hence the acts which shall be sufficient to obtain the sovereign's consent.

2. Voluntary expatriation is only half of the story. Congress has more recently evidenced a proper concern with "the other half of the coin". Where the national interest requires it, Congress is authorized under the doctrine of implied powers or by virtue of the nation's sovereignty to provide for the compulsory loss of citizenship.

We shall deal with the foregoing propositions at length, but we anticipate proceeding further than their mere refutation. We propose to demonstrate additionally that Section 401(j) is in truth a penal provision and that the constitutional protections required in criminal proceedings were wholly absent here. Moreover, we expect to show that, beyond being punitive in the modern sense, the section provides in actuality for the outmoded, primitive punishment of banishment and hence that it constitutes cruel and unusual punishment. Professor Harold Hurst of the University of Denver has recently traversed the same ground with great skill. His article at 29 Rocky Mountain Law Review 62-81 is annexed hereto as Appendix "A".

III. IF 401(j) IS "MERELY" A CONGRESSIONAL DEFINITION OF ONE OF THE MEANS OF ACCOMPLISHING VOLUNTARY EXPATRIATION, IT IS AN UNCONSTITUTIONAL CONCLUSIVE PRESUMPTION

A. Two Preliminary Considerations

I. The word "voluntary" in this context characterizes expatriation per se as being a matter of free choice. It does not mean merely that the particular act designated by Congress was done without coercion.

It has been repeatedly held that expatriation is, by definition, the voluntary renunciation or abandonment of nationality and allegiance. (Ex Parte *Griffin*; 237 Fed. 445; *Dorean* v. *Marshall*, 170 F.(2d) 721; *Perkins* v. *Elg*, 307 U.S. 325; 8 U.S.C. 800 (Repealed) 13 Stat. 233). This apparently simple principle has, however, been frequently misapplied. The word "voluntary" has been understood to mean simply that the act relied on by the government must *be free from coercion*. This misconception has persistently appeared in connection with a line of cases arising out of World War II, which dealt with American citizens who were forced to join foreign armed forces or to vote in foreign elections against their will.

The courts have consistently held (without reaching the further question of constitutionality) that foreign military service or participation in foreign elections will not be grounds for expatriation if attributable to threat, legitimate fear, or even lesser pressures. (54 Columbia L. R. 932). But the concept of voluntary expatriation means far more than this. In *Savorgnan* v. *United States*, 338 U.S. 491, this Court quite recently said:

> "Traditionally the United States has supported the right of expatriation as a natural and inherent right of all people. Denial, restriction, impair-

ment, or question of that right was declared by Congress, in 1868, to be inconsistent with the fundamental principles of this government. From the beginning, one of the most obvious and effective forms of expatriation has been that of naturalization under the laws of another nation. However, due to the common-law prohibition of expatriation without the consent of the sovereign, our courts hesitated to recognize expatriation of our citizens, even by foreign naturalization, without the express consent of our government. *Congress finally gave its consent upon the specific terms stated in the Citizenship Act of 1907 and its successor, the Nationality Act of 1940. Those acts are to be read in the light of the declaration of policy favoring freedom of expatriation which stands unrepealed.*" (Italics ours)

Clearly, then, the word "voluntary" characterizes expatriation as a *freely-chosen change of status.* It is not merely a confirmation of the rather manifest proposition that an act which is alleged to have resulted in expatriation will be held not to have done so if it was performed at the point of a gun.

2. The definition of expatriation as a freely chosen change of nationality is not inconsistent with the Savorgnan Rule that the statutory test is objective.

In *Savorgnan* v. *United States*, supra, it was held that the statutory test determining whether expatriation had occurred was an objective one, that is to say the state of mind of the actor was immaterial. *This was no contradiction of the concept of expatriation by voluntary choice.* The petitioner had denounced her allegiance to the United States and sworn her allegiance to a foreign state. The act relied on by the government was clearly and unambiguously *an exact*

equivalent, indeed virtually a perfect definition, of voluntary expatriation. The Court very properly held that the petitioner could not be heard to claim a private intent to the contrary. She could no more have been allowed to disavow her expatriation than one can deliberately fire a revolver at the head of another and deny an intent to kill. The law must proceed on the assumption that we intend the natural and obviously inevitable consequences of our acts; the result otherwise would be chaos.

But what of the case where the act singled out by Congress is very far from being such a conclusive equivalent of voluntary expatriation? Suppose, for example, that the act were forgery of United States currency, or theft of goods in interstate commerce—or indeed suppose it were departing the country in wartime to avoid the draft. Would Congress still be engaged merely in designating the means of accomplishing voluntary expatriation?

B. If Expatriation Can Only be Accomplished by Voluntary Choice, Then 401(j) Can Only be a Statutory Conclusive Presumption, and as Such it Fails to Meet the Requirements of Due Process of Law.

Is 401(j) in reality an evidentiary presumption? Advocates of the theory now under discussion join with us in affirming that expatriation must be an exercise of voluntary choice. And since such acts as serving in a foreign army, voting in a foreign election, or seeking haven from the draft in a foreign country appear to be something less than dictionary definitions of voluntary relinquishment of citizenship, it is difficult to avoid concluding that Congress has designated certain acts which give rise to a *presumption* of such a voluntary relinquishment.

An examination of the earlier Immigration and Nationality Act of 1907 lends persuasive confirmation to this conclusion. The pertinent language reads, "Any person shall be *deemed* to have expatriated himself when . . ." (Italics ours). And the word "deemed" has long been established to be the exact equivalent of "presumed". (*United States* v. *Davis*, 50 F.(2d) 903, 904; *Cooper* v. *Slaughter*, 50 So. 477, 481; *In re Waldron's Estate*, 267 Pac. 191; *Moody* v. *State*, 17 S.W.(2d) 919, 920.) At an earlier date, then, Congress was candid in designating its enactment as a group of statutory presumptions.

The same language was not retained in the later statutes, including the one presently challenged. But a mere change in language will not change a presumption into something else, if such it remains in practical effect. This Court has plainly so announced in *Schlesinger* v. *Wisconsin*, 270 U. S. 230.

Moreover, we have also seen in the *Savorgnan* case that the doing of the overt act is enough; it may not be rebutted by a showing of a subjective lack of intent. Clearly, then, Section 401(j) is not merely a prima facie presumption; it is a conclusive one.

In short, the act of departing or remaining outside of the United States for the purpose of draft evasion gives rise, under the challenged section, to a conclusive presumption of a voluntary relinquishment of nationality.

The question, then, is by what criterion this presumption shall be tested to determine whether it satisfies the requirements of due process of law. One writer has framed the pertinent rule this way:

> "The general proposition is supported by many cases that a legislature cannot constitutionally

make one fact conclusive evidence of another material fact in controversy if the former is not, in and of itself, conclusive." (86 ALR 182)

In thus framing the rule the writer relied principally on the case of *Heiner* v. *Donnan*, 285 U. S. 312, 328-329, in which the Court held in part as follows:

> "The government makes the point that the conclusive presumption created by the statute is a rule of substantive law, and, regarded as such, should be upheld; and decisions tending to support that view are cited. The earlier revenue acts created a prima facie presumption, which was made irrebuttable by the later act of 1926. A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof; (citations) and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one it is open to challenge and disproof, and in the other, conclusive. However, whether the later presumption be treated as a rule of evidence or of substantive law, *it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality*, and the result is the same, unless we are ready to overrule the Schlesinger case, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization. *This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.* (Citation). 'It is apparent,' this court said in the Bailey case (page 239), 'that a constitutional prohibition can-

> not be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.'" (Emphasis ours).

In the case just quoted, this Court struck down "an attempt by legislative fiat to enact into existence a fact which does not and cannot be made to exist in actuality". Here was vindication for the protest of Chief Judge McLaughlin of the District Court of Hawaii, in attacking another subsection, that "the right of expatriation is not to be converted into a liability by *Congressional fiat.*" *Okimura* v. *Acheson*, 111 F. Supp. 803.

The remaining question, then, is whether Congress has thus violated due process here. *In other words, is the act of departing the country in wartime to avoid military service the conclusive equivalent of a voluntary relinquishment of nationality?*

Surely this point need not be belabored. Congress has imposed expatriation under this subsection only when a boundary of the United States is crossed, yet it would seem obvious that the choice of the Kentucky Hills or the Republic of Mexico as a refuge is an accident of geographical location, not differing purpose. And more broadly, we know by common experience (or by common sense) that while the moving cause of draft evasion may be fear, avarice, or even unadorned ignorance, it is very rarely indeed a desire to renounce one's nationality.

401(j) was a wartime measure, passed in 1944 as the Allied military effort approached its climax. It was intended to facilitate the work of selective service

officials by imposing a drastic penalty on those who removed themselves beyond their territorial jurisdiction. It was a punitive, disciplinary imposition of compulsory loss of citizenship, and it was nothing else. To call the act of leaving the country while committing the Federal felony of draft evasion an exercise of the right of voluntary expatriation is not only double talk—it is a particular kind of double talk which this Court has expressly called unconstitutional. Tested in terms of the first line of argument, Section 401(j) fails to meet the Fifth Amendment requirement of due process of law.

IV. CONGRESS IS WITHOUT POWER TO IMPOSE COMPULSORY LOSS OF CITIZENSHIP

A. The Force and Effect of Mackenzie v. Hare.

Able counsel for the government have not been unaware of the vulnerability of the argument just discussed. In anticipation of its disintegration, they have forthrightly taken the stand in recent cases that voluntary expatriation is wholly *irrelevant* in testing the constitutionality of Section 401(j), because the section is frankly a punitive, disciplinary measure which Congress is empowered to impose in the national interest under the doctrine of sovereign and implied powers. The contention is an honest one, and it stakes out a field of combat which is much more suitable for the determination of this controversy.

But if it were not for some language in a Supreme Court decision of 1915, this latter-day position would be a very lonely one. It was earlier asserted very vigorously by this tribunal that Congress has only the power to confer citizenship, not the power to take it away (*United States* v. *Wong Kim Ark*, 169 U. S.

649). And expatriation was otherwise treated solely as a matter of voluntary choice throughout the judicial history of this Court.

The decision from which government counsel derive comfort, of course, is *Mackenzie* v. *Hare*, 239 U. S. 299. And we would be ill-advised to treat lightly the question of the propriety of this reliance. The learned Circuit Court of Appeals for the Ninth Circuit in the case now before the Court depended entirely upon the decision, without any further analysis, in holding Section 401(j) constitutional. (*Perez* v. *Brownell*, 235 F.(2d) 364, cert. granted 352 U. S. 908). Yet we persist in our confidence that the *Mackenzie* case can be shown to be consistent with the view we assert here. Indeed we contend that it furnishes us with substantial affirmative support.

In the discussion just concluded it was conceded that Congress may, for purposes of achieving certainty and of defining the means of obtaining the sovereign's consent, designate certain acts which objectively constitute expatriation, if the acts are clearly and unambiguously the conclusive equivalents of the voluntary relinquishment of nationality. *The pivotal fact in Mackenzie* v. *Hare is that the act designated by Congress was, in 1915, exactly such a conclusive equivalent.*

The statute in question provided that "any American woman who marries a foreigner shall take the nationality of her husband." In 1915 the social revolution often designated as "The Emancipation of Women" was far from completed. Passage of the Nineteenth Amendment was five years in the future. When a woman married, her legal identity still merged

for most purposes with that of her husband. "The identity of husband and wife is an ancient principle of our jurisprudence," wrote the *Mackenzie* Court. "It was neither accidental nor arbitrary, and worked in many instances for her protection. There has been, it is true, much relaxation of it, but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband."

Logically, if an American woman merged her identity with a foreigner by marrying him, she became a foreigner.

And still apprehensive that it might be understood to be departing materially from the concept of voluntary expatriation, the Court painstakingly disavowed any such intention. After summarizing with considerable care the authorities cited by the plaintiff in this connection, the Court said, "There need be no dissent from the cases cited by plaintiff; there need be no assertion of a very extensive power over the right of citizenship or of the imperative imposition of conditions upon it."

If there had been no more than this, the case would be wholly and completely consonant with the traditional concept of expatriation by voluntary choice. Congress, having provided for expatriation by means of one of its unambiguous and exact equivalents, would have been properly sustained on that ground alone.

But of course, there *was* more than this. After reaching conclusions which would have completely satisfied a later, *Savorgnan* tribunal, the 1915 Court,

went on to add the language which has been the principal (if not the only) judicial justification of consequence for the development of the concept of involuntary or compulsory loss of nationality:

> "Plaintiff . . . bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers . . . there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. . . . This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid, but demanded. It is the conception of the legislation under review that such an act may bring the government into embarrassments, and, may be, into controversies. . . ." (239 U.S. 311-312).

The next inquiry must inevitably be why the Court felt impelled to embark on this expedition, when there was apparently ample support for its holding in traditional authority.

The answer may be a matter of chronology. Until this moment in 1915, virtually the entire body of appellate opinion had dealt with expatriation as ex-

clusively a matter of voluntary choice. Now suddenly the question was raised, apparently for the first time, as to whether the allegedly expatriated citizen could protest that although the act in question was admittedly done, there was no actual, subjective intent to relinquish citizenship. In view of the traditional treatment of expatriation as a matter of voluntary choice, it is hardly surprising that the Court did not immediately leap to embrace the objective test for expatriation. Understandably, it sustained the plaintiff in her contention that expatriation under the challenged statute was compulsory in character:

> "It will thus be seen that plaintiff's contention is in exact antagonism to the statute. Only voluntary expatriation, as she defines it, can divest a woman of her citizenship, she declares; the statute provides that, by marriage with a foreigner, she takes his nationality."

But viewed in the perspective of the *Savorgnan* case which was to follow thirty-five years later, "plaintiff's contention" was not at all "in exact antagonism to the statute". If marriage to a foreigner was one of the *conclusive equivalents of expatriation*, then such a marriage properly should be held to have resulted in expatriation regardless of any contrary secret intent on the part of the citizen. If *Mackenzie* v. *Hare* had been heard in 1950, the Court would have held that "plaintiff's contention" as to the lack of subjective intent was not "in exact antagonism to the statute" ***but rather was simply irrelevant.***

Mackenzie v. *Hare*, however, was heard in 1915, not 1950; and the Court was much impressed with the plaintiff's contention that the statute was indeed a departure from the concept of expatriation as a freely

chosen right. It therefore concerned itself with the question of whether the sovereign's conduct of foreign relations did not invest it with an inherent power to provide for expatriation.

In short, the lack of the Savorgnan rule in its arsenal reasonably explains the decision of the Mackenzie Court to venture into the field of compulsory expatriation. Viewed in the light of the *Savorgnan* case, the excursion now has only the force of *obiter dictum*. In terms of present law, the Court said all it needed to say when it affirmed that marriage to a foreigner was the equivalent of a voluntary relinquishment of citizenship.

And finally the *Mackenzie* rule must be very drastically limited in scope, even if we accord it all possible force. We have seen that the Court expressly disavowed any intent to depart from the traditional concept of expatriation by voluntary choice, but that it pointed to the absolute necessity that the sovereign be unimpeded in its conduct of relations with other powers. "This is no arbitrary exercise of government", said the Court. "It is one which, *regarding the international aspects*, judicial opinion has taken for granted would not only be valid, but demanded." The Court was thus at pains to avoid any suggestion that the principle could be extended to the nation's *internal* affairs. Moreover, the problem which was found to invoke the inherent powers of the sovereign was the *change of allegiance from one country to another*. Nowhere does the Court even remotely suggest that the demands of the sovereign's conduct of foreign relations could justify the use of compulsory loss of citizenship as a *criminal punishment*.

There need be no challenge of *Mackenzie* v. *Hare* on behalf of the present petitioner. Far from being *stare decisis*, it serves to bring the vice of the statute challenged here into sharper focus.

B. The Doctrine of Inherent Powers Arising From Sovereignty Cannot Sustain the Challenged Statute.

The holding (or speculation) of the *Mackenzie* Court just discussed was expressed in more concrete terms in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, as follows:

> "It will contribute to the elucidation of the question if we first consider the difference between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic affairs. That there are differences between them and that these differences are fundamental, may not be doubted.
>
> "The two classes of powers are different both in respect of their origin and their nature. The broad statement that the Federal government can exercise no powers except those specifically enumerated in the Constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." (299 U.S. 315-316).

Is this language sufficient to sustain Section 401(i)?

Plainly the statute was enacted to facilitate the enforcement of the Selective Service Act. Plainly the statute was concerned with the "waging of war". In the *Curtiss-Wright* case, Mr. Justice Sutherland asserted that the power to wage war was, like the peaceful conduct of foreign relations, an inherent power of the sovereign. Should we then conclude

that the Section is "necessary and proper" to implement an inherent power of the sovereign, rather than a constitutional power delegated to the Federal Government?

To argue thus is to contend that all things done by the Federal Government in the name of national defense are immune from constitutional limitations. It is to deny the validity of the historic pronouncement of Mr. Justice Taney:

> "*Nor can any argument be drawn from the nature of sovereignty, or the necessity of government for self-defense in time of tumult and danger.* The Government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted." (Ex Parte Merryman, 17 Fed. Cas. 144)

Moreover, the source of Federal power to provide for compulsory military service has never been held to arise out of inherent powers of the sovereign. Rather it has been expressly held to derive from the express power granted by the Constitution "to raise . . . armies". (*United States* v. *McIntosh*, 283 U. S. 605; *Ex Parte Milligan*, 4 Wall. 2; concurring opinion of Mr. Justice Chase.)

Of what use are all of the war powers granted by the Constitution if the Government already had them in the first place? These same war powers were surrendered to the Federal Government by the States and by the people only after prolonged hesitation, bitter debate, and sober contemplation. No other problem

was more prominent in the minds of our framers than this. Do we say now that they were really concerned about nothing at all?

Surely the proper rule is that the doctrine of sovereign powers should be invoked (if it should be invoked at all) only where the Constitution is silent. In the present instance, the Constitution has expressly provided for the power "to raise . . . armies". Either section 401(j) is "necessary and proper" to the implementation of this power or it is not.

But does the Government contend that we have too narrowly construed its position here? Is it contended that the power to provide for compulsory loss of citizenship is a plenary power of the sovereign *per se*, beyond and above the power to conduct foreign relations or to wage war, and above and beyond the strictures of the Constitution? This would seem to be the trend of some recent Government briefs.

Suffice it to say that there exists no shred of authority to sustain this frightening proposition. *Mackenzie* v. *Hare* is the highwater mark of compulsory expatriation, and the very most that can be attributed to the *Mackenzie* Court is the proposition that where change of citizenship from one nationality to another impinges upon the sovereign's conduct of foreign relations, the sovereign may resolve the conflict by providing a statutory means for distinguishing citizens from non-citizens. Nowhere is there the barest hint that the power to take away citizenship is *per se* a plenary power of the sovereign.

C. Congress Derives No Power From the Constitution to Provide for Compulsory Expatriation.

1. The significance of the lack of an express grant of power.

It would seem apparent that if the framers had an overriding purpose in the omission of an express power to take away citizenship, there can be no *implied* power to do so. Citizenship by birth is conferred by the Fourteenth Amendment. And while Congress is empowered to confer citizenship by naturalization (Article I, Section 8) nowhere is it empowered to take it away. (*United States* v. *Wong Kim Ark*, 169 U. S. 649) The citizen, moreover, may be deprived of life, liberty and property as long as it is done by due process of law, but the Constitution grants no such power over citizenship — with due process or without.

Is there a significance to this silence? Can it be argued that citizenship is but a lesser component of life and liberty and hence need not have been expressly designated? It may be that the answer can be found by inquiring what citizenship, American Citizenship, really is.

We have already said, by way of preamble, that citizenship is the most basic of all our rights simply because it is the source of our right to be here, our right to remain here. Looking outward through the eyes of the individual, this is, no doubt its most valuable attribute. Without it, certainly, the other great guaranties of the Constitution mean little indeed.

But citizenship is also of crucial importance in another and quite different respect. *Citizenship as a*

status is an indispensable component of the democratic structure:

> "The individualist idea underlies all the better known conceptions of the French Revolution. Liberty is the liberty of the individual, equality the equality of individuals in the possession of legal rights, fraternity a free, voluntary, and enthusiastic coalescence of individuals into a body politic. The 'nation' in Revolutionary parlance is the result of this free coalescence. It is not a *Volk* bound together by community of physical race or historic culture, into which persons are born by a destiny apart from their own will. *It is a body made up of individuals in their capacity as citizens; it is presumed to exist by voluntary participation in a kind of contract; and what the members have in common is not race, language, or history, but law and rights. The nation, thus defined, is sovereign, but the individual members are not subjects. They are 'citizens' still in possession of their individual liberty; and the idea of citizenship, in which a new and wider liberty were asserted together, was probably the profoundest idea of the French Revolution . . .*" (Essays in Political Theory, Konvitz & Murphy, by R. R. Palmer, page 132). (Emphasis ours)

Citizenship, then, is a recognition of the individual as the all-important entity. *It is the source from which the Individual derives his capacity to contract with Authority for the formation of democratic government.* Even the great freedoms of the First Amendment, ultimate citadels though they seem to be, are but terms and conditions of the contract. Without the status of citizenship, there cannot even *be* a contract.

Here is justification for concluding that the framers designedly withheld the power to abridge citizenship. Well may the framers have concluded that the status of citizenship must be indestructible. It is *life and liberty* which are the lesser components. Life inevitably must end, and liberty, be it ever so magnificent, is but a clause in the contract. *It was the idea of individuality which put an end to tyranny. And citizenship is the most basic expression of individuality.*

We have spoken in the past tense, for our thoughts were of the framers. But in our own time new tyrannies have arisen, and they have had a common denominator: They have evidenced a savage hatred for this same concept of man as an individual, knowing it well to be their mortal enemy. We submit that there was purpose, compelling purpose, in the omission of any express grant of power over citizenship.

2. The "necessary and proper" clause cannot sustain Section 401(j).

It is not seriously argued that the War Powers carry with them any general implied power to provide for loss of nationality. There appears no reason why such a power should be uniquely a requirement of National defense. A cogent argument, however, can be advanced that the power exists by virtue of the "necessary and proper" clause; it has been well stated by a writer otherwise very critical of compulsory deprivation of citizenship:

> "The Constitutional power question posed by the Expatriation Act is whether Congress has power, under the 'necessary and proper' clause, to impose denationalization as a sanction to en-

force a criminal statute enacted pursuant to a granted power. For the Constitution grants no explicit power to define and punish any crimes except treason, crimes against the law of nations, and several crimes of relatively rare occurrence. Nearly all Federal criminal statutes stem from the power to enact legislation which is 'necessary and proper' to carry out the expressly granted powers into execution. Neither does the Constitution grant any express power to impose fines, imprisonment or any other particular type of punishment; these powers are implied as well. And since the decision in *McCullough* v. *Maryland*, the 'necessary and proper' clause has been interpreted as a grant of power rather than a limitation upon power. The Supreme Court has never interpreted this clause to authorize review of the discretion of Congress in choosing the means by which to carry into execution the powers conferred by the Constitution. The Constitutional phrase 'necessary and proper' means 'necessary' only in a sense that a reasonable legislator might consider the means chosen necessary to implement a granted power, and 'proper' in the sense that no specific prohibition is violated.

"Even if the 'voluntary' rationale is disregarded, as seems both likely and desirable, it nevertheless seems certain that under present case law the 'lack of power' argument is doomed to failure. The expatriation act is clearly a 'necessary' means of enforcing the statutes against treason, rebellion and subversion since it will tend to deter violation of these statutes. And the question whether it is 'proper' legislation seems foreclosed by the decision in *Dennis* v. *U. S.*, which held that the Smith Act was a legitimate exercise of Federal Government's power of self-protection. Unless the Supreme Court is willing to find in the 'necessary and proper' clause a new

limitation on Congressional power, arguments against the necessity and propriety of penal expatriation must be directed not to the courts but to the Congress. The constitutionality of the Expatriation Act would appear to depend ultimately upon whether use of denationalization as a punishment for crime violates explicit Constitutional limitations on Congressional power." (64 Yale Law Journal 1464).

The same writer has vigorously challenged the constitutionality of Section 401(j) on two other grounds (pg. 1182, note 98, pg. 1196 et seq., Id.), so we must be given pause by his comments in this regard.

But he has passed by the most basic vice of the statute: Rights which are fundamental to this nation's form of government may not be indirectly subverted by making the denial of them a form of criminal punishment.

Some hypothetical enactments may bring the issue into focus. How would we regard a statute which provided that any draft evader who departed the United States would thenceforth be denied the right to worship in any public church or synagogue—or perhaps only in such churches and synagogues as the Secretary of State might designate? What would we say of a statute which forbade a convicted draft evader to participate in any political discussion, or to join in any assembly composed of more than five persons? Or what of a statute forbidding such a draft evader from thereafter printing, or causing to be printed, for distribution to any other person or persons, any expression of thought, idea, or opinion? And let us consider a "lesser" invasion—consider a statute providing that a convicted draft evader would

never thereafter be entitled to a trial by jury if any criminal proceedings were later brought against him!

The fundamental liberties are curtailed, of course, by penal incarceration, and are ended permanently by execution. But these are inevitable concomitants of the punishment itself. We speak here of the use of the deprivation of basic rights as an *independent penal sanction.*

But what of the civil disability statutes operative in many of the states? These statutes deal in reality with the *privileges* of citizenship; they forbid, for example, the former convict to sit upon a jury, to vote in any election, to hold public office, to engage in certain kinds of employment. *But unanimously they refrain from denying to the former convict his freedom of speech, religion, press and assembly—or even such procedural protections in criminal proceedings as the right of trial by jury or the privilege against self-incrimination. We find no authority whatever for using the deprivation of a fundamental protective right as a criminal punishment.*

What then of citizenship? What then of "this most comprehensive and basic right of all?" (*Klapprott v. United States*, 335 U.S. 601, 616). Is it any less a fundamental protective right?

We have seen that even the fundamental liberties are grounded in turn in citizenship, for such guaranties are idle unless there is presupposed the right to be here to exercise them. *If abridgment of fundamental liberties per se may never be used as a penal sanction because of their paramount role in a democratic society, a fortiori is this true of the more basic right of citizenship. The "necessary and proper" clause, broad*

though its scope may be, cannot transcend this principle.

V. SECTION 401(j) IS A PENAL PROVISION AND AS SUCH IT IS WHOLLY LACKING IN THE CONSTITUTIONAL PROTECTIONS REQUIRED IN CRIMINAL PROCEEDINGS.

A. Is the Statute Penal in Character?

It is difficult to know, at this late date, how extensively the present subject should be pursued. Both courts and writers now seem agreed that, whatever may be said of the power of Congress to provide for compulsory expatriation, Section 401(j) and a number of its companions are plainly punitive and penal in character. And now it seems generally understood that denaturalization proceedings and the deportation of aliens are clearly distinguishable from the present problem. To take from a native American the citizenship which is his constitutional birthright and to banish him forever to some far corner of the earth is so plainly a punitive sanction of the harshest kind that one feels apologetic in belaboring the point. In arguments below, however, this was never conceded by the Government. It would therefore seem necessary to marshal some of the authorities here.

In protesting once more that the deprivation of citizenship, even in denaturalization cases, is penal in character Mr. Justice Rutledge said:

> "Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.
>
> "*No such procedures could strip a natural born citizen of his birthright or lay him open to such a penalty.*" (*Klapprott* v. *U.S.*, 335 U.S. 601, 616).

At 66 Harvard Law Review 643, 735, the writer concludes:

> "The entire policy of using expatriation as a means of criminal punishment, particularly where statelessness results, should be reconsidered . . . it seems clear that the loss of nationality because of treason, desertion, or draft avoidance should not be regarded as the voluntary choice of the individual, but rather as a penalty imposed by the Government."

At 64 Yale Law Journal 1164, 1180:

> "It seems certain that expatriation as imposed by the Act of 1954 is 'punishment' within the constitutional definition of that term. The distinction between punishment, in the constitutional sense, and non-penal civil deprivations has never been made entirely clear by the courts. Several commentators have suggested, however, that the crucial element is penal intent on the part of Congress. Probably the severity of the deprivation is also relevant in determining this question. By both criteria the expatriation act is penal. The debates on the act indicate that the functions of denationalization were to be those usually associated with criminal sanctions: deterrents and punishment."

And at 99 U. of Penna. Law Review 25, 70:

> "The present tendency toward using denationalization as a penalty should be discarded. At the moment loss of citizenship is a supplemental penalty for desertion, treason, and leaving the United States to avoid conscription. Presumably, the intention of the lawmakers was to deprive those convicted of the above crimes of their civil rights. But as the law now reads, treason, desertion, and leaving the country to avoid military

service are listed as criteria for the determination of when an American has voluntarily expatriated himself."

B. The Constitutional Protections Required in Criminal Proceedings Are Wholly Lacking.

To argue that the express constitutional power to raise armies implies a necessary and proper power to use compulsory loss of citizenship as a penal sanction to punish draft evasion is to admit that the compulsory deprivation of citizenship is in truth a criminal proceeding. Section 401(j), unlike its 1954 successor, required no criminal conviction. The trier of fact was therefore a Federal administrative agency. It scarcely seems necessary to belabor the fact that the section is wholly lacking in the necessary safeguards in criminal proceedings such as presentment by grand jury, trial by jury, the privilege against self-incrimination. (64 Yale L. J. 1182)

VI. COMPULSORY EXPATRIATION IS CRUEL AND UNUSUAL PUNISHMENT

Section 401(j) provides for the permanent loss of citizenship and hence the assumption of alien status. No authorities need be cited at this late date to establish the absolute authority of the Government to provide for the deportation of aliens. The challenged statute is therefore nothing more or less than a provision for banishment or ostracism, a primitive criminal sanction which has long since (or so it had been thought) disappeared from Western civilization:

> "To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights in almost all others. *To lay upon the citizen the punishment of exile . . . is a penalty thus far un-*

known to our law and at most doubtfully within Congress' power." (*Klapprott* v. *U.S.*, 335 U.S. 601, 616) (Italics ours).

The following text material is illuminating:

"It remains only to mention exile, which is essentially an alternative for the death sentence, and has the same effect, so far as the community which desires to rid itself of a culprit is in question. Banishment may, however, be temporary or for life. It may also be compulsory, or by legal fiction, it may be voluntary, the criminal being liable to execution if he remains at home. It was by this subterfuge that transportation was instituted, as we shall see in a subsequent chapter. Transportation always involves the dilemma that the persons exiled are either good or bad citizens; if good, they are a loss to their native country; but if bad, that country has no right to impose the burden of their presence upon an unwilling community. Every community is unwilling which has reached a stage of development at which it is self-sustaining without convict labor. The Romans divided banishment into deportation and relegation; deportation was exile to a place specified, from which the banished were not allowed to depart; but relegation was simple exile, and did not involve loss of citizenship. A form of banishment called ostracism . . . existed at Athens . . . it was inflicted by popular suffrage at a special election . . . Ostracism did not involve the confiscation of the exile's estate, as the ordinary form of banishment did . . . *the mind dislikes to dwell upon acts of violence, such as have been described in this dark chapter of human nature at its worst.*" "Punishment and Reformation", Frederick Howard Wines, Chapter V (Intimidation and Torture) pages 85 and 86. (Italics ours)

There is much more to be said on this subject in more specific terms. What needs to be said, however, has already been committed to paper with a thoroughness and precision which paraphrasing could only weaken. Particular attention is respectfully invited to 64 Yale Law Journal 1164, 1187-1194.

CONCLUSION

Section 401(j) of the Immigration and Nationality Act of 1940 is an attack of very serious proportions on vital constitutional safeguards. It is urged that the section be declared unconstitutional on its face, that the petitioner be declared a citizen of the United States, and that any and all orders heretofore made or issued by any person whomsoever providing for his deportation be declared null and void.

Respectfully submitted,

DI GIORGIO AND DAVIS
By THOMAS R. DAVIS

FISCHER, WILLIS AND PANZER
By JOHN W. WILLIS